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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

BART STONE,

Plaintiff and Appellant,

v.

JAMESON ARTHUR LOVELL and
DONALD LOVELL,

Defendants and Respondents.

2d Civil No. B212959
(Super. Ct. No. SC049831)
(Ventura County)

Bart Stone appeals from the judgment entered in favor of respondents James Arthur Lovell and Donal Lovell after the trial court denied a motion for new trial. (Code Civ. Proc., § 657.) Appellant claims that he was denied a fair trial because defense counsel, in circumvention of an in limine order, asked inflammatory questions about prior drug convictions. The trial court, in denying the motion for new trial, concluded there was no miscarriage of justice. We affirm.

Procedural History

Appellant sued for personal injuries after he was injured while turning left at a controlled intersection. Respondents defended on the theory that appellant initiated the turn on a green signal, failing to yield the right of way to respondent's approaching vehicle. (See Veh. Code, § 21801. subd. (a))

At a December 10, 2007 deposition, appellant admitted that he had suffered a 1989 felony conviction for possession of methamphetamine but denied any other felony

convictions. He had, however, pled guilty to felony possession of methamphetamine and was on probation and attending a Proposition 36 drug program. (Pen. Code, § 1210.1.) The 2007 felony drug conviction was vacated on May 1, 2008 after appellant completed the drug treatment program. (Pen. Code, § 1210.1, subd. (e)(1).)¹

On the first day of trial, appellant brought an in limine motion to exclude any reference to the 1989 felony drug conviction. Respondents agreed that the 1989 conviction was not relevant but wanted to introduce evidence of the 2007 felony conviction to show that appellant made an untrue statement at his deposition.

Appellant's attorney was unaware of the 2007 conviction and brought an in limine motion the third day of trial before appellant was cross-examined. The trial court ruled that the 2007 conviction was admissible because appellant had stated at his deposition that he did not have a conviction. Although the 2007 criminal action was dismissed after appellant completed the drug program, appellant was on felony probation when the deposition was taken. The court ruled that "it's not coming in as a felony impeachment. It's coming in because he said no, I wasn't convicted."

On cross-examination, appellant was asked about his deposition and whether he had been asked about felony convictions other than the 1989 conviction. Appellant objected. The trial court did not rule on the objection but indicated that appellant could make a record outside the presence of the jury².

¹ Penal Code section 1210.1, subdivision (e)(3) provides that if the defendant completes the drug treatment program and the criminal complaint is dismissed, "the defendant may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or convicted for the offense. . . ."

² The cross-examination was as follows:

"MR. HAGEMANN: [Defense counsel]: [¶] Q. At your deposition on December 10, 2007 when I asked you about that question regarding whether you had been convicted of any other felonies other than that possession charge in 1989 –

"MR. SCHWARTZ [counsel for appellant]: Objection, your Honor. May we approach?

"THE COURT: No. I will make a record outside the presence of the jury.

"Q BY MR. HAGEMANN: Why was it that you told me that you hadn't been convicted of any other felony?

"A. On my deposition?

After appellant admitted the 2007 conviction, defense counsel asked: "That was a felony for possession of methamphetamine?" Appellant promptly objected and the trial court sustained the objection. Appellant was cross-examined on many other matters including the circumstances of the accident, how he located witnesses, his employment, and his medical condition and treatment.

After the jury recessed for the day, the trial court stated that appellant had the "right to make a motion for mistrial." The court was "not sure" it would grant the motion but it "would certainly let it go into the record."

Appellant declined to move for mistrial and asked defense counsel to explain what happened. The trial court stated that the discussion is "more between you and I at this particular time" and instructed defense counsel not to mention the 1989 and 2007 convictions in final argument. The trial court again offered to entertain a motion for mistrial and advised appellant "to think about it overnight." Appellant declined to bring the motion. Thereafter, the jury returned a 12-0 verdict in favor of respondents. Appellant moved for new trial based on attorney misconduct, which was denied.

"Q. Yes.

"A. When I went to court, they told me I was going to go to a program and once this program was completed that I wouldn't have a felony. So I was under the understanding that this felony was not pending until I either completed the program or failed the program, but I did complete it.

"Q. Now your guilty plea was on February 1st, 2007, correct?

"A. Yes.

"Q. That was a felony for possession of methamphetamine?

"MR. SCHWARTZ: Objection, your Honor.

"THE COURT: I will sustain.

"Q. MY MR. HAGEMANN: Your deposition was on December 10, 2007, correct?

"A. Yes.

"Q. Your case was not dismissed or resolved until August 1st, 2008; is that correct?

"A. Yes.

"Q. So at the time I took your deposition, you knew that you had a felony conviction; isn't that correct?

"A. I was misunderstood."

Motion for New Trial

In reviewing an order denying a motion for new trial, we are required to review the entire record, including all the evidence, and make an independent determination whether the misconduct was prejudicial. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872.) The record is incomplete. Appellant has provided only a partial transcript of the cross-examination and the trial court's discussion with counsel.

What record there is shows that appellant did not request a jury admonition or move for mistrial. "It is a well-established principle that a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished." (*Curcio v. Svanevik* (1984) 155 Cal.App.3d 955, 963.)

Citing *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795, appellant argues that the failure to request a curative instruction does not forfeit the issue on appeal where the trial court quickly overrules an objection and the party has no opportunity to request a curative admonition. But that is not what happened here.

With respect to the first question ("[W]hether you had been convicted of any other felonies other than that possession charge in 1989?") the trial court did not rule on the objection. It did sustain the objection to the next question.

The trial court explained: "Counsel made one objection that I technically overruled because I could not do anything else with it" The court was surprised because "we never talked about" the 1989 conviction and "there wasn't any way I could unring the bell. . . ."

Appellant's reliance on *Love v. Wolf* (1964) 226 Cal.App.2d 378 is inapposite. There, the Court of Appeal cited 60 instances of flagrant misconduct by plaintiff's counsel and reversed because defendant was denied a fair trial. (*Id.*, at p. 385.) The court stated that it was "egregious [misconduct] beyond any in our experience or that related in any reported case brought to our attention. . . ." (*Id.*, at p. 382.)

Here, two questions were posed about prior convictions. The trial court sustained the objection to the second question and invited appellant to move for mistrial. Counsel for appellant said: "We are pretty far into it" and wanted to proceed with the trial. We draw the inference that appellant did believe the misconduct was serious enough to warrant a motion for mistrial. This was a legitimate trial tactic. We have taken judicial notice of the superior court file and note that the jury was instructed that counsel's questions were not evidence. (CACI 106; Evid. Code, §§ 452, subd. (d); 459.) It is presumed that the jury understood and followed the instructions. (*People v. Morales* (2001) 25 Cal.4th 34, 47.)

Appellant argues that the harm lies in merely asking the question and that it is reversible error. (See e.g., *Balistreri v. Turner* (1964) 227 Cal.App.2d 236, 244.) We disagree. The cross-examination was lengthy (25 pages) and appellant was impeached on many matters. Appellant admitted that he had been involved in another auto accident but "forgot" about it at his deposition. Appellant further admitted that he was not working full time although he testified to the contrary at his deposition. Appellant claimed it was still light out when the collision occurred but the investigating officer testified that it was dark. And appellant made inconsistent statements about which turn lane he was in when he first observed the traffic light, the nature and extent of his injuries and what he told his doctors and hospital staff at a later date when he told them about a bee sting.

The trial court concluded that the error was harmless. (See *Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1161.) "We are mindful of the fact that a trial judge is accorded a wide discretion in ruling on a motion for new trial and that the exercise of this discretion is given great deference on appeal. [Citations.]" (*City of Los Angeles v. Decker, supra*, 18 Cal.3d at pp. 871-872.)

Appellant argues that he would have received a more favorable verdict but for the misconduct. But appellant has provided a scant record, making it impossible for us to review all the evidence. Nor has appellant provided a transcript of the hearing on the motion

for new trial.³ "It is well settled, of course, that a party challenging a judgment has the burden of showing reversible error by an adequate record. [Citations.]" (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.) We do know that the trial judge heard all the evidence and was in a better position than this court to determine whether the verdict resulted wholly, or in part, from counsel's misconduct. (*Cope v. Davison* (1947) 30 Cal.2d 193, 203.)

Appellant had the opportunity to ask for a curative admonition and was invited to move for mistrial but declined to do so. A party who is aware of misconduct during the course of the trial is precluded from gambling on the outcome and moving for new trial after an unfavorable verdict. (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 103; *Wiley v. Southern Pacific Transportation Co.* (1990) 220 Cal.App.3d 177, 186-187.)

The judgment is affirmed. The parties shall bear their own costs on appeal.

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YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

³ Appellant complains that defense counsel interviewed the jury after the verdicts were entered and that counsel, in opposition to the motion for new trial, submitted declarations from the jury foreperson and three jurors. We need not discuss this issue. The declarations are not part of the record on appeal.

Ken W. Riley, Judge

Superior Court County of Ventura

Jeffrey . Schwartz, Schwartz Law and Law Offices of Manuel H. Miller, for
Appellant.

Richardson & Fair, Kenneth A. Hagemann, for Respondents.